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Attorney for Plaintiff
WAYNE BERRY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

WAYNE BERRY,)	
	)	Civ. No. 07 CV-0172 SOM-LEK
Plaintiff,	)	(Copyright)
)	
vs.	)	DECLARATION OF TIMOTHY J.
	)	HOGAN IN SUPPORT OF
DEUTSCHE BANK TRUST	)	PLAINTIFF WAYNE BERRY'S
COMPANY AMERICAS (FKA	)	REPLY TO DEFENDANTS'
BANKERS TRUST COMPANY)AND	)	OPPOSITION TO PLAINTIFF'S
JP MORGAN CHASE BANK IN	)	COUNTER-MOTION FOR
THEIR SEPARATE CAPACITIES	)	PARTIAL SUMMARY
AND AS AGENTS FOR THE PRE	)	JUDGMENT; EXHIBITS "17" TO
AND POST-PETITION LENDERS OF	)	"26"
FLEMING COMPANIES, INC. Et al.,)	
)	
)	
Defendants.)	
_____)	

**DECLARATION OF TIMOTHY J. HOGAN IN SUPPORT OF
PLAINTIFF WAYNE BERRY'S REPLY TO
DEFENDANTS' OPPOSITION TO PLAINTIFF'S
COUNTER-MOTION FOR PARTIAL SUMMARY JUDGMENT**

I, TIMOTHY J. HOGAN, am an attorney licensed to practice before all the courts of the State of Hawaii and I make this declaration under penalty of perjury. All the statements here in are true and correct to the best of my knowledge, information and belief. If called upon to testify upon the matters herein I am competent and willing to do so.

1. Immediately upon learning that Fleming and the Lender were working in concert, I contacted their counsel to negotiate a Tolling Agreement. I had discussion with attorneys for White & Case prior to filing this complaint where I discussed the claims, the authority for the claims and never once was there any hint from counsel that they believed these claims were discharged in the Fleming Bankruptcy.

2. In regard to Exhibit "10" that was addressed in Mr. Berry's counter-motion, that was to be produced *in camera*, in light of the Lenders and their litigation counsel's failure to interpose any objection that would prevent the filing of this email, and for the purposes of a clearer record, Mr. Berry intends to file it prior to the hearing in the continued absence of any objection.

3. Attached hereto as Exhibit "17" is a true and correct copy of excerpt

of the Declaration of Erin Brady (“Brady Dec.”) Exhibit “T” filed in support of the Lenders’ Motion to Dismiss on July 12, 2007. It is a true and correct copy of an excerpt of the Transcript of Proceedings in *In re Fleming Companies, Inc.*, Bk. No. 03-10945 (MFW)(Bankr. Del.) at page 16:11-16 that I extracted from the Brady Dec. I was present at the hearing.

4. Attached hereto as Exhibit “18” is a true and correct copy of excerpt of the Fleming Companies, Inc. Third Amended Plan of Reorganization, I extracted the Brady Dec. Exhibit “S” filed on June 12, 2007.

5. Attached hereto as Exhibit “19” is a true and correct copy of an excerpt from the June 12, 2007 Brady Dec. Exhibit R, containing the Confirmation Order’s treatment of release and exculpation provisions of the Plan.

6. Attached hereto as Exhibit “20” is a true and correct copy of Memorandum Opinion in *Wayne Berry v. Fleming Companies, Inc.*, (9th Cir. 05-15223 dated July 5, 2007).

7. Attached hereto as Exhibit “21” is a true and correct copy of an Excerpt of a Reply Brief filed on August 9, 2005, by Fleming’s PCT in the Court of Appeals for the 9th Circuit, in Docket No. 05-15223.

8. Attached hereto as Exhibit “22” is a true and correct copy of an excerpt of the May 2003 Post-Petition Credit Agreement that I extracted from the

Brady Declaration filed on July 12, 2007, as Exhibit “Q.”

9. Attached hereto as Exhibit “23” is a true and correct copy of an excerpt of the May 2003 Post-Petition Credit Agreement that I extracted from the Brady Dec. Exhibit “Q.”

10. Attached hereto as Exhibit “24” is a true and correct copy of an excerpt of the Brady Dec. Exhibit “D” the final DIP order that I extracted from the Brady Dec.

11. Attached hereto as Exhibit “25” is a true and correct copy of an excerpt from a Bankruptcy Court filed document showing Mr. Kampfner’s email address filed in a certificate of service in *In re Scotia Development, LLC*, Bk. No. 07-20027 (S.D. Texas Corpus Christi Div.) on or about February 1, 2007.

12. Attached hereto as Exhibit “26” is a true and correct copy of an excerpt from White & Case’ firm news letter showing Mr. Kampfner’s email address as of March/April 2007.

Executed at Honolulu, Hawai’i, July 15, 2007.

/S/Timothy J. Hogan
TIMOTHY J. HOGAN